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Votre référence - Your file

Notre référence - Our file
AI-2018-00281 – 00282 / PMJ

Mr. David McKie
CBC
181 Queen Street
Ottawa, Ontario K1P 1K9

Dear Mr. McKie:

This is in response to your requests dated February 11, 2019, for copies of the records released in response to the following requests:

"Copies of files A-2017-00471 and A-2017-00893."

Please note that the enclosed records are provided in the language in which they were originally created, and in the form that they were released under the *Access to Information Act*.

Should you have any questions, do not hesitate to contact our office.

Sincerely,

Christian Lefebvre
Manager, ATIP
Public Services and Procurement Canada

Encl. CD

Canada

Gouvernement du Canada / Government of Canada

151421
ADM: Barbara Glover, 819-997-1094

OCT 26 2017

Security: Normal

MEMORANDUM TO THE MINISTER

FOR DECISION

SUBJECT: Invitation to meet with SNC-Lavalin to discuss its submission on potential enhancements to the Integrity Regime and a potential deferred prosecution agreement regime in Canada

SUMMARY

This memorandum is to obtain your approval and signature on a follow-up letter to Mr. Neil Bruce, President and Chief Executive Officer, SNC-Lavalin. The letter responds to his invitation to meet with you to discuss his company's responses to the questions associated with the consultation on possible enhancements to the Integrity Regime and a potential deferred prosecution agreement regime in Canada.

I recommend that you decline this invitation and that the Assistant Deputy Minister of Integrity, along with officials from other federal departments, meet with representatives of the company to discuss its submission.

TIME FRAME

A decision is requested by October 27, 2017, in order to schedule a meeting with the company in advance of the conclusion of the consultation period.

ISSUE

Mr. Neil Bruce, President and Chief Executive Officer of SNC-Lavalin, has offered to meet with you to discuss the company's submission under the Government of Canada's consultation regarding expanding Canada's toolkit to address corporate wrongdoing.

BACKGROUND

SNC-Lavalin is an engineering and construction group and a major supplier to Canada, notably a member of the consortium for the Champlain Bridge Corridor Project.

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Canada

In 2015, the Royal Canadian Mounted Police charged SNC-Lavalin Group, its division SNC-Lavalin Construction and its subsidiary SNC-Lavalin International with one count of corruption and one count of fraud for alleged improper payments to officials in Libya to influence the award of engineering and construction projects. A judicial process is underway.

Under the Integrity Regime, the Department has the ability to suspend a supplier as a result of a supplier being charged with a listed offence. Alternatively, Public Services and Procurement Canada may impose an administrative agreement in lieu of suspension, on such terms and conditions as necessary, to safeguard the integrity of the procurement and real property transaction process. On December 9, 2015, the Department entered into an administrative agreement with SNC-Lavalin.

On September 25, 2017, the Government of Canada launched a public consultation to seek input on potential enhancements to the Integrity Regime and on whether deferred prosecution agreements should be adopted in Canada.

The Integrity Regime helps ensure that the Government conducts business with ethical suppliers. It also creates an incentive for suppliers to maintain strong ethical standards and effective compliance frameworks. This consultation is also an opportunity to consider the possibility of introducing Canadian-deferred prosecution agreements, which would be negotiated between an accused and the prosecutor, as an additional tool for prosecutors to use to hold offenders to account and deter corporate wrongdoing. They could increase detection of wrongdoing through self-reporting and help improve corporate culture and compliance.

ANALYSIS/CONSIDERATIONS

The consultations related to the Integrity Regime and deferred prosecution agreements in Canada are being led by federal officials from Public Services and Procurement Canada, the Department of Justice Canada, Innovation, Science and Economic Development Canada, and Global Affairs Canada. Within this context, a meeting between federal officials and the company would be the most appropriate venue to discuss its submission.

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CONSULTATIONS

The Department has consulted with and will continue to work with officials from the Department of Justice Canada, Innovation, Science and Economic Development Canada, and Global Affairs Canada regarding the proposed approach to engage the company within the context of the current consultations.

RECOMMENDATION

I recommend that you decline the invitation to meet with Mr. Bruce to discuss his company's submission. I also recommend that you sign the attached letter to Mr. Bruce indicating that Barbara Glover, Assistant Deputy Minister, Integrity, will organize a meeting with the company and other federal officials to discuss its submission.

Marie Lemay, P.Eng, ing.
Deputy Minister
Public Services and Procurement Canada

OCT 3 1 2017

I agree, Carla Qualtrough

I disagree, Carla Qualtrough

Attachments

- Annex A: Letter to Mr. Neil Bruce, President and Chief Executive Officer, SNC-Lavalin
- Annex B: Letter of October 13, 2017, from Mr. Neil Bruce, President and Chief Executive Officer, SNC-Lavalin

Ministre des Services publics et de l'Approvisionnement
Receveur général du Canada

Minister of Public Services and Procurement
Receiver General for Canada

Ottawa, Canada K1A 0S5

OCT 3 1 2017

Mr. Neil Bruce
President and Chief Executive Officer
SNC-Lavalin Inc.
455 René-Lévesque Boulevard West
Montréal, Quebec H2Z 1Z3

Dear Mr. Bruce:

Thank you for your letter of October 13, 2017, and associated submissions regarding the Government of Canada's consultation on expanding Canada's toolkit to address corporate wrongdoing.

This engagement is an opportunity for interested Canadians and stakeholders to provide input on potential enhancements to the Integrity Regime and on a possible Canadian deferred prosecution agreement regime.

This officials-led consultative process will help ensure the Government has effective mechanisms in place to continue addressing corporate wrongdoing in an evolving marketplace.

Therefore, I have asked Barbara Glover, Assistant Deputy Minister, Integrity, to organize a meeting with your representatives to discuss the responses provided in your submissions.

Thank you for participating within the consultation process. Should you have any questions or concerns, you can contact Ms. Glover at 819-997-1094 or at barbara.glover@tpsgc-pwgsc.gc.ca.

Sincerely,

The Honourable Carla Qualtrough, P.C., M.P.

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Canada

c.c.: The Honourable Scott Brison, P.C., M.P.
President of the Treasury Board

The Honourable Navdeep Singh Bains, P.C., M.P.
Minister of Innovation, Science and Economic Development

The Honourable William Francis Morneau, P.C., M.P.
Minister of Finance

The Honourable Jody Wilson-Raybould, P.C., M.P.
Minister of Justice and Attorney General of Canada

The Honourable Chrystia Freeland, P.C., M.P.
Minister of Foreign Affairs

The Honourable James G. Carr, P.C., M.P.
Minister of Natural Resources

The Honourable François-Philippe Champagne, P.C., M.P.
Minister of International Trade

SNC·LAVALIN

SNC-Lavalin Inc.
455 René-Lévesque Blvd. West
Montreal, Quebec, Canada, H2Z 1Z3
514.393.1000 514.866.0795

October 13, 2017

The Honourable Carla Qualtrough, P.C., M.P.
Minister of Public Services and Procurement Canada
11 Laurier Street, Building: Portage III
Tower A, Room 18A1 and
PSP Canada, Room 10A1
Gatineau, Quebec
Canada K1A 9S5

Deferred Prosecution Agreement and Integrity Regime consultation:
Expanding Canada's toolkit to address corporate wrongdoing

Dear Minister,

On behalf of SNC-Lavalin, I welcome your Government's decision to engage in consultations on expanding Canada's toolkit to address corporate wrongdoing through a Deferred Prosecution Agreement (DPA) and further enhancements to the Department of Public Services and Procurement Canada's Integrity Regime.

Founded in 1911, SNC-Lavalin Group Inc., a Montreal-based company, provides end to end engineering services in a variety of industry sectors, including mining and metallurgy, oil and gas, environment and water, infrastructure and clean power. With approximately 54,000 employees, the Company has a strong foothold in North America (45%) but is also represented in Europe and the Middle East/Africa (20% each) and in Asia (15%).

SNC-Lavalin has lived through one of the greatest challenges of its 106-year history. We believe that the company has been able to emerge from this difficult period as a result of the unrelenting commitment of its employees to excellence in ethics and integrity. We have taken many concrete steps to entrench the values and principles espoused in our Ethics and Compliance Program deep into the culture of our company.

In the spirit of one of our core principles, we want to collaborate as fully and extensively as possible as it relates to these important consultations. Only through high quality and exemplary levels of cooperation will the Government of Canada be able to achieve its overall objectives to take "action against corporate wrongdoing and to hold companies accountable for such misconduct." In this regard, the capacity to be able to self-report remains at the heart of both sets of consultations.

SNC·LAVALIN

The Honourable William Morneau, P.C., M.P.
Minister of Finance
Finance Canada

The Honourable Jody Wilson-Raybould, P.C., M.P.
Minister of Justice and Attorney General of Canada
Justice Canada

The Honourable Chrystia Freeland, P.C., M.P.
Minister of Foreign Affairs
Global Affairs Canada

The Honourable James G. Carr, P.C., M.P.
Minister of Natural Resources
Natural Resources Canada

The Honourable François-Philippe Champagne, P.C., M.P.
Minister of International Trade
Global Affairs Canada

Encl.: (2)

SNC·LAVALIN

The time is right to address especially the DPA, as well as the IR. But time is also of the essence. The international playing field is not level between Canadian and foreign engineering and consulting competitors from the United States, the United Kingdom, France and soon from Australia. SNC-Lavalin fully supports the need to take the time to conduct a credible, fair, open and transparent consultation process. However, Canada is clearly behind in terms of using all possible tools to deal as effectively as possible with corporate economic crime. In particular, Canada does not have the DPA tool at its disposal and the IR needs further enhancements to align with our key global trading partners. Accordingly, we urge the Government of Canada to move forward as expeditiously as possible.

It is in this spirit that you will find enclosed answers to questions associated with each consultation. These sets of responses, and appendices, will hopefully demonstrate that SNC-Lavalin shares the Government of Canada's commitment to uphold the highest ethical business practices and, as a result, for the present and in the future will remain a trusted supplier to PSP Canada.

I would be pleased to answer any questions you or your staff may have on the attachments. Importantly, I would appreciate the opportunity to discuss SNC-Lavalin's recent structural and operational changes, improvements to its governance, its world class compliance and integrity regime as well as our short and long term strategic objectives to grow and prosper from our Canadian base in Montreal, Quebec.

Until such time, I wish you best of luck with this important consultation and to the work that must follow.

Sincerely,

Neil Bruce
President and Chief Executive Officer
SNC-Lavalin

c.c. The Honourable Scott Brison, P.C., M.P., B.Comm.
President of the Treasury Board
Treasury Board of Canada

The Honourable Navdeep Bains, P.C., M.P.
Minister of Innovation, Science and Economic Development
Innovation, Science and Economic Development Canada

October 13, 2017

Submission to the DPA/Integrity Regime Consultation
DPA Submission

Serious cases of corporate economic crime should be dealt with severely. However, it is unfair that the actions of one or more rogue employees should tarnish a company's reputation, as well as jeopardize its future success and its employees' livelihoods. While the commercial organization bears some responsibility for its employee's misconduct, prosecution with a guilty plea could preclude it from doing business with key public and private sector customers, in Canada and abroad. The best course forward is for Canada to adopt the deferred prosecution agreement (DPA) to combat corporate economic crime. DPAs already are used or being developed in several countries (Appendix 1). This leaves Canada at a distinct competitive disadvantage. Investors may be reluctant to expose themselves to an uncertain enforcement regime in Canada, resulting in additional legal risks. Canadian companies have already lost significant contracts abroad because global competitors have been able to impugn the integrity of the firm, despite comprehensive remediation actions, while corruption charges are pending.

Question 1: In your view, what are the key advantages and disadvantages of DPAs as a tool to address corporate criminal liability in Canada?

Arguments in favour of DPAs:

- Encourage self-reporting by companies (Canada's Integrity Regime discourages reporting – the consequences are potentially dire while there is no specific safe-harbour regime for coming forward).
- Improved enforcement outcomes – prosecution costs/risks avoided, justice served by deterrence effect of fines and criminal prosecution of corporate officers, monitorship akin to a probation period.
- Improve compliance and corporate culture.
- Avoid undue negative consequences for stakeholders, including employees, investors and other third parties who had no involvement in the crime.

Arguments against DPAs: The most common cited arguments against DPAs are:

- Could weaken the deterrent effect of prosecution.
- Perception that DPAs can allow companies to 'buy their way out of trouble'.
- Do DPAs provide sufficient incentive to companies to encourage self-reporting misconduct?

These arguments against have no merit. DPAs negotiated in the USA, and recently in the UK, have highlighted the importance of transparency, self-reporting and cooperation as it relates to such offences. Without the DPA tool, there would be far fewer cases of misconduct brought to the public's attention. The Canadian DPA is recommended as an additional tool, not as the only tool, in the combat against corporate economic crime. It's a more efficient and effective way of holding organizations accountable without the cost and uncertainty traditionally associated with criminal trials.

Question 2: For which offences do you think DPAs should be available and why?

- Initially, DPA's should be available in alleged cases of economic crime by organizations. This includes offences such as fraud, false accounting, corruption, foreign bribery and money laundering (or dealing with the proceeds of crime), exportation and/or importation of prohibited or restricted goods, and related offences.

- Why? So the Government of Canada can focus on an area where Canada could really use another tool with respect to prosecuting economic crime by organizations.

  However, the Government of Canada should have the flexibility to expand the scope of use of DPAs to a broader set of offences by organizations. For now, a narrower scope is appropriate with the flexibility to expand as Canada becomes more comfortable and experienced with this new tool to combat corporate economic crime.

- In principle, the DPA tool can be applied in other areas of corporate offenses, such as: health and safety, environment, other regulatory offences, or even other prosecuting authorities.

- Generally, DPAs should not be made available to individuals. Companies seeking DPAs should be required to cooperate fully with authorities to bring the individuals who engaged in the alleged misconduct to justice. The authorities should be tough on individuals who engaged in the alleged misconduct. Companies do not act on their own – they can and do only act through individuals and those individuals ought to be held to account for their breaches of both law and company policy.

Question 3: What role do you think the courts should play with respect to DPAs?

There is a role for the courts with respect to DPAs. The overall question for the courts is whether the proposed or draft DPA would bring the administration of justice into disrepute. For example, some US courts have rejected US DPAs where the company was to pay a sanction but there were no consequences for the individual employees who caused the company to breach US law – it was felt by those US judges that letting the individuals in those cases escape justice was unacceptable. Also, the courts should provide their views on whether the draft terms and conditions of the DPA are fair, reasonable and proportionate.

- The courts involvement in the DPA process should be to provide 'judicial scrutiny' that is independent, fair, impartial, and transparent.
- The involvement of the courts/of a judge should instil confidence and certainty into the DPA process.
- There should be oversight that the final agreed upon terms between the public prosecutor and the organization appropriately address the alleged wrongdoing by both individuals and the corporate employer.
- It is not the role of the courts to sentence or to try the offence.

It is appropriate for a court to provide their views to the public prosecutor on ways and means to amend the draft DPA (before the court), subject to final approval of both the public prosecutor and the company.

Question 4: What factors should to be taken into account in offering a DPA?

- To maintain and uphold independence, the offer to enter into DPA discussions should be at the discretion of the public prosecutor. However, sole discretion should not just rest with the public prosecutor. There should be an administrative process by which an organization can proactively submit a DPA or settlement proposal without prejudice to any future proceeding, or to the independence of the public prosecutor. This would not only enhance self-reporting, but it would deal with an obvious gap in the current public administration of such matters. Additionally, there is merit to explicitly acknowledging the possibility of retrospective application of a DPA.
- An offer to enter into such discussions should not be construed as a commitment of the public prosecutor to provide a DPA to the organization.
- If the public interest would be met by entering into a DPA with an organization, then the public prosecutor should give such action its full consideration.
- The public interest choice to enter into DPA negotiations should be based on the following (non-exhaustive) factors:

- Degree of pro-active cooperation with the Crown.
- Degree of self-reporting.
- History of similar conduct prior to the alleged wrongdoing, ie, regulatory, financial, etc.
- The existence of a corporate compliance programme, or substantive evidence that the organization has engaged proactively in remediation by building or improving a credible and effective compliance programme since the alleged misconduct.
- Whether the offending conduct represents the actions of individuals or is sanctioned by company policies and practice (as approved by the board of directors) and whether those individuals who engaged in the misconduct are still with the organization.
- Whether the organization engaged in structural organizational reforms to improve its reporting structures and to take steps to avoid any future alleged misconduct.
- The existence of credible and effective steps to change the culture of the organization.
- That a criminal conviction is likely to have disproportionate negative impacts on innocent people, ie, shareholders, pension plan holders, employees, suppliers and other stakeholders.
- That the impact of prosecution leads to substantive economic/commercial damage to the organization, such as the inability to provide services in Canada, in North America and in global markets with government contracts, lower revenues from debarment by governments and/or exclusion by key clients, impairment of competition in contested markets, negative impacts on the Canadian supply chain, negative impact on governments' procurement, defence and infrastructure markets, and substantive redundancies of innocent personnel.

- That there was substantive economic/commercial damage to the organization in the intervening period between the alleged misconduct and the decision to enter into DPA negotiations.
- Other existing or newly created forms of guidance for the public prosecutor may also be taken into account in the offering of a DPA to an organization.

Question 5: When would a DPA not be appropriate?

A DPA would not be appropriate if it is not in the public interest for the public prosecutor to engage in such an action. The factors that may contribute to a DPA as not appropriate include:

- The seriousness of the alleged misconduct...the most important factor in the decision to prosecute or to not prosecute and offer a DPA negotiation.
  - A significant level of harm is done to the public, or to victims of the alleged wrongdoing.
  - A substantial negative impact on the integrity/confidence of markets, or of governments.
  - There are severe aggravating features to the misconduct, eg, multi-jurisdictional, took careful planning (pre-meditated), involved several senior executives and elements of board approval in the organization.
- A history of similar conduct – repeat offender.
- Failure to prosecute for similar or for more serious breaches of the law.
- The organization either had no (or an ineffective) compliance organization, or has not made significant progress to establish an effective compliance program since the alleged misconduct.
- The organization has been previously warned, sanctioned, or criminal charges have been laid with no substantial changes to prevent such conduct in the future.
- Complete lack of collaboration with authorities.

Question 6: What terms should be included in a DPA?

A DPA should include some or all of the following, depending upon the specific case or situation (non-exhaustive and flexible):

- A statement of facts relating to the offence.
- A time period for the duration of the DPA (a reasonable period for the government to become satisfied that remediation steps are complete and the likelihood of a recurrent offence is slim to non-existent).
- Acknowledgement of responsibility for the conduct and that if similar conduct recurs during the DPA term that the company may be prosecuted for the original as well as the new crime.
- Obligation to cooperate with any investigation and prosecution of company staff.
- Disgorgement of profits made from the misconduct, through payment of fines (Appendix 2).
- A financial penalty that takes into account penalties imposed on competitors and the seriousness of the crime, and factors such as collaboration with authorities. This is perhaps done as in the UK and US DPA models -- with the application of a discount to the financial penalty.
- An obligation to replace implicated individuals who may be still with the organization.
- An obligation to cooperate with any current or future investigation of the alleged past offence
- The consequences for the defendant if it engages in further misconduct
- Implementing or improving a company compliance program.
- Imposition of a monitor for a period of time, where appropriate, to audit compliance.
- A public statement from the Crown and the company about the DPA.

The benefits of a DPA scheme for Canada will be achieved with a model that does not require the negotiation of an admission to criminal liability for alleged misconduct.

Question 7: What factors should be taken into account in setting the duration of a DPA?

- The maximum/minimum duration of a DPA should depend upon the circumstances of the alleged misconduct and the facts provided during the negotiation
- Each DPA should have an expiry date, where the DPA no longer has effect.
- An expiry date provides clarity as to the duration of the DPA for both the public prosecutor (the Crown) and the organization's leadership.

Question 8: Under what circumstances should publication be waived or delayed?

- A careful balance needs to be maintained between ensuring public confidence in the DPA as a tool to combat economic crime with the need to provide organizations and their representatives with a high level of certainty and confidentiality to negotiate the DPA. Organizations with alleged misconduct are less likely to come forward to negotiate a DPA if their negotiating position might be compromised with early publication of facts, etc. Therefore, there should be no publication in the initial stages of the DPA negotiation.
- Should Canada choose court oversight for the Canadian DPA, then it is likely that a sitting judge will provide a reasoned explanation for their satisfaction and the appropriateness with the negotiated DPA. This reasoning should remain private until the DPA is approved and then generally should be made available to the public.
- Where such a judicial reasoning, or agreed upon statement of facts, should be waived or delayed is where there may be restrictions that are necessary to protect the credibility and process of other ongoing or future prosecutions against the organization, or former employees. This should also apply to the actual publication of the announcement of a DPA between the public prosecutor and a commercial organization.

Question 9: How should non-compliance be addressed?

The public prosecutor should provide the organization with an opportunity to address the non-compliance.

If there are repeated examples of non-compliance, beyond the organization's control, the organization should have the opportunity to address the non-compliance and to renegotiate the terms of the DPA with the public prosecutor.

The court should determine, upon advice of the public prosecutor, whether non-compliance has taken place.

There should be a factual finding as to the degree of the non-compliance.

There should be consequences for non-compliance of a DPA, including possibly: a financial penalty, additional terms/conditions, extension of the expiry date of the DPA, or even termination of the DPA

Question 10: When should facts disclosed during DPA negotiation be admissible in a prosecution against a company?

See Question 8. Facts disclosed during DPA negotiations should be admissible in a future prosecution against a company for other similar crimes, subject to any necessary protections associated with the credibility and process of the other ongoing or future proceedings against the company, or former employees. Further, on the presumption that Canada will consider a made-in-Canada DPA that is somewhat or closely aligned with the UK/Australia models, then disclosure obligations that are reflective of our mutual common law traditions should apply to the entire DPA process, including when facts disclosed during the DPA negotiation should be admissible as evidence in another proceeding.

Question 11: How should compliance monitors be selected and governed?

Independent compliance monitors should report directly to the office of the public prosecutor but be engaged by the organization in accordance with the DPA between the public prosecutor and the organization.

Selection of independent monitors should be made on the basis of a mutually agreed set of criteria/terms. The monitorship selection process used in the Integrity Regime by the Department of Public Services and Procurement could serve well as a model for the Public Prosecutor.

There should be a terms of reference for the engagement of the independent monitor between the organization and the public prosecutor, and then a letter of engagement between the monitor and the organization, The terms of reference and engagement of the independent monitor for the public prosecutor should take into consideration the mandates of other monitors that may already be in place with the organization.

Question 12: What use should be made of compliance monitoring reports?

Compliance Monitoring reports should provide an effective review of the implementation and effectiveness of the ethics and compliance programme of the organization, measured against the integrity guidelines/principles or other criteria of the public prosecutor, and the organization's compliance with its other obligations under the DPA. The monitor's report should provide recommendations for future improvements to the ethics and compliance programme of the organization, and to the organization's compliance with the DPA, and implementation of these recommendations should be made in a timely manner by the organization. Implementation plans to action the monitor's recommendations should be made by the organization in writing.

Question 13: Under what circumstances should victim compensation (i.e. anticipatory restitution) be included as a DPA term?

In the case of economic crime, the "victim" may not be an identifiable individual. It may be difficult to determine how restitution should be calculated, apportioned among and/or paid to victims. Further, broader victim compensation generally falls within provincial jurisdiction, and may not be applicable in the case of a foreign-based offence.

Any anticipatory restitution as part of the terms of a DPA should take into account other actions and proceedings before the courts (to the extent possible given differing jurisdictions).

If the Government of Canada imposes a material fine, such as a penalty reflecting the profit earned from the misconduct, it may not be appropriate to impose a further restitution obligation for an offence.

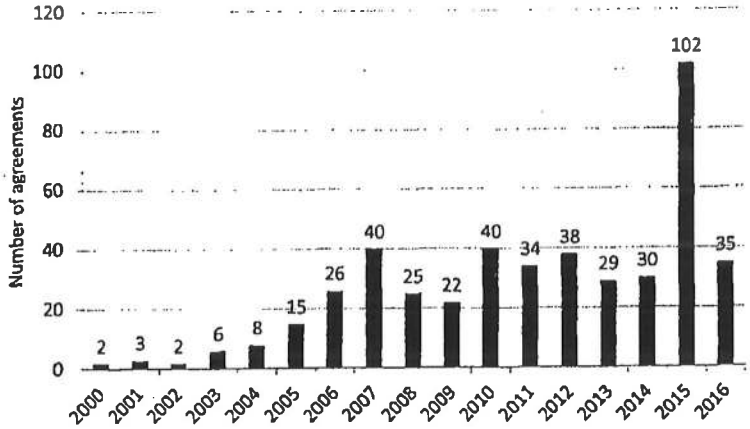
Generally, appropriate restitution for an alleged victim needs to be proven separately in the most appropriate jurisdiction. The calculation of the amount of restitution is generally quite burdensome and is perhaps best left to other proceedings.

Other Comments or Suggestions

A made in Canada DPA should clearly apply when charges are pending before the courts at the time of entry into force of legislation. Parliament can enact legislation to apply as of a time prior to its entry into force. While retrospective application of new laws are not the norm, there are many exceptions to that rule. Retrospective application in the case of the introduction of DPAs for Canada is a recommended and effective way of adjusting for the transition into a DPA regime. There would not be interference with the functions of the courts nor any impairment of judicial independence.

Introduction of a new tool to combat economic crime that provides an alternative dispute resolution mechanism should be welcome. This is especially the case given the pressures that Canada's courts are facing in light of the Supreme Court's judgments in R. v. Jordan.

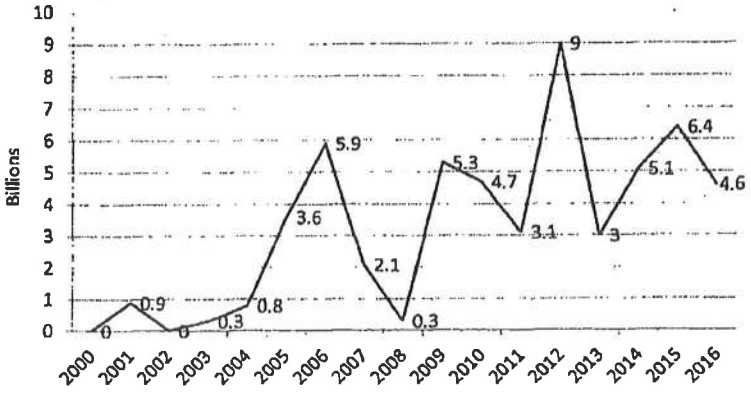
Appendix 1: US Corporate DPAs and NPAs, 2000-2016



Note: Includes both DOJ and SEC DPAs and NPAs. Also, UK has entered into 2 DPAs so far in 2017.

Source: Gibson & Dunn, 2017 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAS) and Deferred Prosecution Agreements (DPAS), July 2017

Appendix 2: Total US monetary recoveries related to DPAs/NPAs, 2000-2016



Note: Includes both DOJ and SEC DPAs and NPAs. Also, UK has entered into 2 DPAs so far in 2017, with financial penalties, disgorgement of profits and other compensation valued at more than 1.16 billion British pounds

Source: Gibson & Dunn, 2017 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAS) and Deferred Prosecution Agreements (DPAS), July 2017

October 13, 2017

Submission to the DPA/Integrity Regime Consultation
Integrity Regime Submission

Question 1: To what extent, if any, should the duration of ineligibility and/or suspension be modified to ensure appropriateness while continuing to mitigate risk?

The decision to render ineligible or suspend an organization, and the duration, should be commensurate with the public interest and proportionate with the seriousness of the misconduct. On the duration of ineligibility and/or suspension, PSP's Integrity Regime current rules do not appear to be aligned with other countries, namely our key trading partners (per case studies in discussion document). The current duration rules leave the Canadian business community at a distinct competitive disadvantage as compared to other suppliers of services and procurement in other countries.

There should be more flexibility built into the sanctions part of the regime – an automatic 5-10 year disbarment is a heavy consequence, and there are multiple possible crimes (and degree of corporate culpability, or not in the case of rogue employees acting in defiance of well-articulated company policies) that can trigger application of the Integrity Regime. There should be a measure of discretion in applying disbarment to ensure that the punishment fits the actual crime of the organization (see answers to questions 9 and 10).

The Government of Canada should align its procurement ineligibility and suspension duration guidelines to that of its major trading partners and specifically to the United States. As indicated in the discussion document, discretion allows for an organization in the United States to be excluded from bidding on procurement contracts for up to three years, with the possibility of extension. This also means that discretion allows for a zero debarment time period. There should also be a clearly delineated process put in place for the ineligible organization to reduce the period of ineligibility.

Question 2: How could the exercise of greater discretion be built into the Integrity Regime to address issues associated with periods of ineligibility? What factors should be considered in determining whether a supplier should benefit from discretion?

Rendering an organization ineligible is a very serious action, and it should clearly be in the public interest to take such action. The causes for declaring an organization ineligible should be outlined in the Integrity Regime but it does not necessarily mean that the organization should in fact be rendered ineligible. The seriousness of actions by the organization or omissions of remedial measures or mitigating factors should be considered in making any ineligibility decision. The following factors should be considered in determining whether a supplier should benefit from discretion:

- Has the organization put in place effective standards of conduct and internal compliance controls, including review procedures as well as ethics and compliance training programs.
- Did the organization bring the alleged misconduct as a cause for ineligibility to the attention of the Government of Canada in a timely manner?
- Did the organization engage in a full investigation of the circumstances associated with the cause of the ineligibility?
- The degree of cooperation by the organization with the Government of Canada.
- Whether the organization has agreed to make restitution related to the offending activity.
- Whether the organization has taken action against the individuals responsible for the alleged misconduct.
- Whether the organization has put in place remedial measures, including those recommended by the Government of Canada.

- Whether the organization's senior management acknowledges the seriousness of the misconduct and put in place measures to prevent recurrence, eg, tone from the top, whistle blowing actions, etc.
- Mitigating factors that should be taken into account, as proposed by the organization.

Consideration should be given to a revision mechanism, whereby a debarred organization can ask for a revision after a certain time, if it believes that the above factors have evolved since the debarment was imposed upon the organization.

Question 3: Are there other offences that call into question the integrity of a supplier that should be considered for inclusion within the Ineligibility and Suspension Policy? If so, what are they?

Other offences that call into question the integrity of the supplier should not necessarily be specifically included in the Government's Ineligibility and Suspension Policy. Indeed, such specificity may not be consistent with the Government's focus in this consultation on federal government procurement contracts and the integrity of the federal procurement system.

There is reason to be concerned with the possible extraterritorial reach of the Government of Canada in this regard. An integrity regime that takes into account civil or provincial offences, other federal offences related to corporate wrongdoing, allegations, or debarment decisions in other jurisdictions could be made without full regard for the systems of jurisprudence associated with the other jurisdictions, leniency provisions or other rules therein. The focus of the Government of Canada should remain within the realm of Canadian government(s) and specifically with respect to the procurement of goods and services.

For example, Germany and Sweden do not subject organizations to criminal prosecution. However, it is indeed possible if not likely that each country has equivalent if not more stringent and significant administrative provisions to deal with misconduct of organizations in those countries. In the case of Germany this seems to be the case. Such administrative provisions could be as adequate or more adequate to the task of preserving the integrity of procurement regimes in those countries. Thus, the risk associated with the Government of Canada's procurement regime is mitigated while the Government of Canada may not be as familiar with third country administrative rules and provisions.

Question 4: What factors should be considered in determining whether new offences should be included?

The Government of Canada should consider including in its policy the right to render ineligible or to suspend any supplier who has engaged in misconduct that indicates a lack of business integrity that seriously and directly impacts the responsibility of the Government of Canada as a contractor or subcontractor.

Question 5: At what point should the Government of Canada consider actions regarding corporate wrongdoing when making a determination of suspension or ineligibility? What wrongdoing or action would warrant a federal response?

The Government of Canada should <u>not</u> consider actions regarding corporate wrongdoing on the basis of allegations, or when under investigation, to determine whether to suspend or render ineligible an organization. Assessment of future risks is not the primary principle upon which to render such serious actions. Rather, such actions could be contemplated when it has been concluded/determined that immediate action (in the present) is required to protect the public interest.

A key question before the Department of Public Services and Procurement is whether it has the administrative capacity to engage in such actions.

Question 6: How should Integrity Regime determinations of ineligibility be applied to non-procurement federal services?

Integrity Regime determinations of ineligibility should only be applied to procurement related federal procurement. Such determinations should not be applied to non-procurement federal services. The criteria for the determination of ineligibility differ across various government agencies. Best practices should be shared between the PSP Canada and various Canadian government agencies who conduct due diligence and their own assessments of eligibility.

Question 7: What impact should a debarment decision made in another jurisdiction or by another organization have on a supplier's status under the Integrity Regime?

Debarment decisions made in other jurisdictions by another organization should have no impact on a supplier's status under the Integrity Regime. Specific reference is made in the discussion paper to the practice of cross debarment by the five multilateral development banks (MDBs). This is an especially questionable practice that would sacrifice the jurisdictional independence of Canadian federal agencies. It also results in ad hoc decision making that may be subject to the policy priorities of new governments, such as recently with respect to international development contracting in the Canadian government context.

Cross debarment leads to confusion between jurisdictions who are parties to cross debarment agreements and those that are not party to such provisions in other fora. Further, the Government of Canada's criteria and process in determining eligibility will undoubtedly be different than that of MDBs. This could result in a debarment outcome in one jurisdiction, but not in another jurisdiction.

Rather than multiplying the deterrence factor, cross debarment undermines the capacity and capabilities of the organization to improve itself and to develop stronger practices regarding ethics and conformity, and to move forward as a good corporate citizen.

If an organization is debarred by a provincial jurisdiction or agency using similar criteria as the Government of Canada, then it makes sense to at least examine with greater scrutiny such actions viz. the organization's relationship with the Government of Canada. However, the reverse is also true. If a provincial agency, such as the Authorité des Marchés Financiers, makes a decision not to debar an organization, utilizing its own criteria, then the Government of Canada should take this provincial action into consideration as it relates to the supplier's status under the Integrity Regime.

Question 8: What type of measures should be taken to preclude those with known membership in or associations with organized crime from being awarded a federal contract or real property agreement?

There are very limited measures that can or should be taken to preclude those with known membership in or associations with organized crime from being awarded a federal contract or real property agreement. To repeat, the Government of Canada should generally not take actions to preclude, suspend or debar on the basis of allegations, or associations.

However, if there is enough evidence that the public interest could be negatively impacted by the award of such a federal contract or agreement, then the Government of Canada should consider giving itself the discretion to preclude such an award/agreement (if it does not already have such discretion).

Steps could be taken in the procurement process, as well in the descriptions of suppliers found in relevant government data bases, to be as up to date as possible with respect to known membership and associations with organized crime.

Question 9: Should application of the Integrity Regime be broadened to include federal entities beyond departments and agencies? What factors should be considered when determining what other organizations should be required to adopt the Integrity Regime?

and

Question 10: How could the Government of Canada use the Integrity Regime to achieve other social, economic or environmental policy objectives?

Amendments are required to the Integrity Regime, including some that are mentioned in this submission, before consideration to apply the IR on a broader basis, to include federal entities beyond departments and agencies, or to achieve other social, economic or environmental policy objectives. Some of the policy objectives indicated in the discussion document are indeed deserving of support, including for example the UK's Modern Slavery Act. But the IR needs to be brought into alignment with similar regimes in other countries. It needs some adjustment so that the Government of Canada can truly "use its purchasing to positively and uniformly influence corporate behavior."

As constructed, the existing regime does not promote self-disclosure. The punitive consequences of the Integrity Regime – 5-10 years disbarment from bidding or working on Federal contracts (with cascading effect on provincial governments, foreign governments and private sector contracts) - are sufficiently draconian to preclude most if not all companies from ever self-reporting acts of misconduct under the current Integrity Regime. The Integrity Regime does not allow a company to purge itself of an offence by, for example, coming forward to the government to say "these 2 employees engaged in misconduct, we have fired them as their acts are inconsistent with our policies, we have tightened processes to make their misconduct more difficult in future, etc..."

Effectively, companies should be allowed to properly disclaim individual acts of misconduct as not reflecting the "mens rea" or true intent of the company. In such cases there should be little or no consequence to the company if the latter has clearly demonstrated by its behaviour, promptly after the misconduct is discovered and investigated, that it completely disclaims such conduct and itself substantively punishes and/or dismisses without compensation or reward the individual perpetrators of the misconduct. The company can send no clearer signal to all its other employees that it means what its policies say and will not condone or reward misconduct. If there is to be any penalty in such circumstance, it should be proportionate to the negligence, if any, of the company in publishing its compliance program, training staff on the compliance program, and enforcing its compliance program. If the company has not been so negligent, (per a previous answer) then no punishment of the company is necessary as its own behaviour is self-correcting. When it comes to fostering a culture of good ethics in business, as the saying goes: "One good sacking is worth a thousand memos."

By not having a self-disclosure safe-harbour, the Integrity Regime actually makes it harder for companies to dismiss staff for misconduct – the consequences to the company of proving in court the employee misconduct, where the misbehaving employee disagrees he/she is being dismissed from their employment for cause, expose the company to potentially 5-10 years of debarment and the resultant impact to the company's eligibility to compete for Canadian government and other customer contracts. If the company quietly dismisses the employee and pays them compensation (as it must) because cause cannot reasonably be proven publicly in court due to the disbarment risk under the Integrity Regime, that can be made to look as though the company is rewarding a bad employee for their misconduct. Finally, that absence of a safe-harbour for self-disclosure may expose companies to blackmail by their current or former employees who are aware of misconduct – their own or that of another employee.

In sum, the Integrity Regime should have a safe-harbour provision for self-disclosure, and should not lead to punishment of companies that have legitimately disavowed their employee's misconduct in ways that make it clear the company itself had no criminal intent to commit the misconduct.